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No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARC BELDING ANDERSON, ET AL., PETITIONERS

v.

GENERAL LEWIS B. HERSHEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-C, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

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Petitioners are Selective Service registrants who intentionally failed to maintain either their registration or classification cards in their personal possession (see 32 C.F.R. 1617.1, 1623.5). As a result of such violations of Selective Service regulations, they were declared to be delinquent by their local boards, pursuant to 32 C.F.R. 1642.4 (Pet. 8, 9). Those who were not already I–A were reclassified pursuant to 32 C.F.R. 1642.12[1] (*ibid.*).

[1] Petitioners held the following classifications: I–A (available for military service); II–S (undergraduate student); I–Y (physical or mental deferment); III–A (dependency deferment) (Pet. App. 2a, n. 2).

Petitioners then brought this pre-induction suit challenging the validity of their delinquency status and reclassifications on both constitutional and statutory grounds (Pet. 9). The district court dismissed their action for injunctive and declaratory relief on the ground that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)), prohibits the pre-induction judicial review of the "classification or processing" of registrants (Pet. App. 13a–15a). The court of appeals, with one judge dissenting, affirmed (Pet. App. 1a–12a). It found nothing in this Court's decisions in *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, that rendered amended Section 10(b)(3) inapplicable where deferments, as distinguished from exemptions, were involved (Pet. App. 3a–6a). It further held that the delinquency regulations, at least as applied here, were neither constitutionally infirm nor inconsistent with the statute, and, finally, rejected petitioners' contention that their reclassifications were punitive in nature (Pet. App. 7a–11a).

This case presents substantially the same questions as *Breen* v. *Selective Service Local Bd. No. 16*, No. 65, this Term, in which certiorari was granted on April 28, 1969 (394 U.S. 997). Indeed, the court below relied extensively on the Second Circuit's opinion in *Breen* (406 F. 2d 636) in reaching its result. Since this Court's holding in *Breen* is likely to be controlling here, we respectfully submit that it would be

appropriate to defer action on the instant petition until after a decision has been rendered in that case.[2]

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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[2] Petitioners appear to suggest that certiorari should be granted here, despite the pendency of *Breen* (with the cases presumably consolidated for argument), because the instant case involves a number of registrants who previously had a variety of deferments, whereas "*Breen* poses only the limited question of the effect of Section 10(b)(3) upon registrants reclassified from II-S" (Pet. 11, n. 6; see also Pet. 14–15, 19). As the court below pointed out, however, if the delinquency regulations are valid where II-S registrants are reclassified, "they may be applied *a fortiori* to I-A, I-Y, and III-A classifications" (Pet. App. 11a). Petitioners themselves concede that the pertinent statutory language is more discretionary in character with respect to these latter classifications (see Pet. 14–15). Moreover, *Gutknecht* v. *United States*, No. 71, this Term, in which certiorari was granted along with *Breen*, involves the application of the delinquency procedure to a registrant already classified I-A, a point not mentioned by petitioners (see Pet. 19–20). No clear reasons appear to exist, therefore, for giving the instant case plenary consideration along with *Breen*.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1969

KOLDEN *v.* SELECTIVE SERVICE BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70. Decided February 24, 1970*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded to the respective United States Courts of Appeals for further consideration in light of *Breen* v. *Selective Service Board*, 396 U. S. 460.

MR. JUSTICE HARLAN would reverse the judgments in these cases and remand them on the basis of his separate opinion in *Breen* v. *Selective Service Board*, 396 U. S., at 468, and the Court's opinion in *Gutknecht* v. *United States*, 396 U. S. 295.

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*Together with No. 73, *Chaikin* v. *Selective Service Board, et al.*; No. 164, *Faulkner* v. *Laird, et al.*; No. 183, *Osher* v. *Selective Service Board, et al.*; on petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit; No. 331, *Kraus* v. *Selective Service System, et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit; and No. 449, *Anderson* v. *Hershey, et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.